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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CALEB MARTIN LAND,

Defendant and Appellant.

F077096

(Super. Ct. No. CRF26118)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Tuolumne County. Kevin M. Siebert, Judge.

Brandon M. Kilian, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Snauffer, J.

Appellant Caleb Martin Land pled guilty to driving under the influence causing injury (Veh. Code, § 23153, subd. (a)) and admitted a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)).¹ On appeal, he contends the court erred when it denied his motion to reduce his conviction to a misdemeanor. We find merit to this contention and remand to the trial court for it to consider Land's motion.

FACTS

In the early morning of December 8, 2007, Land was driving a car in Tuolumne County with a fourteen-year-old male passenger, when he ran off the road. His passenger suffered two fractures to his left leg. Approximately three hours after the accident, Land had 0.06 percent blood alcohol content.

On May 19, 2008, pursuant to a negotiated plea, Land entered his plea as noted above. His plea agreement provided that he would be placed on probation for five years, required to serve up to a year in jail, and after three years, if he did not have any violations, he could petition the court to reduce his conviction to a misdemeanor (§ 17, subd. (b)). On June 16, 2008, the court placed Land on felony probation per his plea agreement on condition that he serve five months in jail.

On September 14, 2009, Land admitted a probation violation that was based on his conviction for being a minor in possession of alcohol (Bus. & Prof. Code, § 25662, subd. (a)). On October 13, 2009, the court continued Land on probation but ordered him to serve two months in jail.

On July 5, 2011, the court heard and denied Land's motion to reduce his conviction to a misdemeanor.

On September 16, 2013, the court heard Land's motion to dismiss his conviction pursuant to section 1203.4 and a second motion to reduce his conviction to a misdemeanor. The court took the matter under submission. On September 23, 2013, the

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

court granted the motion to dismiss his conviction but denied the motion to reduce it to a misdemeanor.

On September 19, 2017, Land filed a third motion to reduce his conviction to a misdemeanor. The court held a hearing on the motion on October 25, 2017, and on January 3, 2018, the court denied the motion, stating:

“The court has not been provided any legal authority to suggest it retains jurisdiction to rule on this motion when an identical motion was filed previously and denied. Based on this lack of jurisdiction, the [c]ourt denies the motion. Even if the [c]ourt had jurisdiction, the [c]ourt would defer to the ruling of the judge who sentenced Land, dealt with his probation violation and ruled on his previous Penal Code section 17 motion, since presumably the judge was most familiar with the facts of the underlying case, the plea and the defendant’s conduct while on probation.”

DISCUSSION

Land contends the court abused its discretion when it denied his motion to reduce his conviction to a misdemeanor because it had jurisdiction to consider his third motion to reduce his conviction and it should not have deferred to the court’s previous ruling. He further contends the matter should be remanded to the trial court for a hearing on his motion. Respondent agrees that the matter should be remanded for a hearing.

A first-time violation of Vehicle Code section 23153 is a “wobbler,” punishable as a felony by imprisonment in state prison or as misdemeanor in county jail (Veh. Code, § 23554; Pen. Code, § 17, subd. (a)).

Section 17, subdivision (b), in pertinent part provides that a wobbler is a misdemeanor “[w]hen the court grants probation to a defendant and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.” (§ 17, subd. (b)(3)).

Section 17, subdivision (b) does not limit how many times a defendant may move to reduce a wobbler to a misdemeanor. (Cf. *People v. Sy* (2014) 223 Cal.App.4th 44, 66 [trial court did not abuse discretion in denying defendant’s motion to reduce conviction

and indicating it would reconsider the motion at a later time after ensuring defendant complied with probation terms and did not continue selling counterfeit marks].) Thus, the trial court erred in concluding it did not have jurisdiction to consider Land's 2017 motion to reduce his conviction to a misdemeanor.

In ruling on a defendant's motion to reduce his conviction the court must consider the facts surrounding the offense and the characteristics of the offender. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) Moreover, the failure to exercise discretion is an abuse of discretion and the appropriate relief is to remand to the trial court for it to exercise its discretion. (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99–100.)

The trial court here refused to exercise discretion because it believed it did not have jurisdiction to hear Land's motion to reduce his conviction. Although the court stated that if it had jurisdiction it would deny the motion, it indicated its decision would not be predicated on the facts surrounding Land's offense or his individual characteristics. Therefore, we will remand the matter to the trial court so it may conduct a hearing on Land's motion during which it may consider the appropriate factors in ruling on it.

DISPOSITION

The trial court's order denying Land's motion to reduce his conviction to a misdemeanor is reversed. The matter is remanded to the trial court so that it may conduct a hearing on Land's motion to reduce his conviction for violating Vehicle Code section 23153 to a misdemeanor and rule on the motion after considering the appropriate factors.